SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

Docket No. 71-1181

IN THE MATTER OF THE APPLICATION
OF
ELSIE H. FLANAGAN and NINNA MURRAY,
Petitioners,

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,
Respondents.

Petition for a Writ of Certiorari to the Appellate Division, Third Department, of the State of New York.

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vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,

Respondents.

TO THE HONORABLES, THE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE STATE OF NEW YORK.

Petition for Writ of Certiorari to the Appellate Division, Third Department, of the State of New York.

The petitioners above named respectfully pray that a writ of certiorari issue in the above-captioned case, directed to the Appellate Division, Third Department, of the State of New York, to review its order dated De-

cember 24, 1971, and entered in the office of the clerk of that court on December 24, 1971 (28).*

Opinions Below.

The only opinion (22) below was that rendered by the Supreme Court, Albany County, which was handed down on June 11, 1971, and reported in 66 Misc. 2d 736. The opinion on the motion for reargument was handed down on July 9, 1971, and is not officially reported.

The Appellate Division, Third Department, affirmed the order dated June 11, 1971, without opinion.

By order, dated February 16, 1972, petitioners' motion for leave to appeal to the Court of Appeals was denied.

By order, dated February 10, 1972, respondent's motion to dismiss the appeal taken by the petitioners was granted by the Court of Appeals on the ground that no substantial constitutional question is directly involved.

Jurisdiction.

The order of the Appellate Division, Third Department, was dated and entered on February 9, 1972. The jurisdiction of this honorable court is invoked under Title 28, United States Code, Section 1257.

Proceedings Below.

This proceeding under Article 78 of the Civil Practice Law and Rules was commenced by the service of a petition on or about the 13th day of May, 1971.

*Parenthetic references are to the Appendix hereto unless otherwise noted.

The motion by the Commissioner of Education of the State of New York to dismiss the petition was made on May 25, 1971, and the motion to intervene and dismiss was made on May 26, 1971.

Petitioners appealed to the Appellate Division, Third Department, from a judgment entered in the office of the Clerk of the County of Albany on the 7th day of July, 1971, which dismissed the petition herein on the merits to review a judicial decision of the Commissioner of Education, dated March 23, 1971 (No. 8256), which decision dismissed an appeal by the petitioners herein and one Charlotte Harris from the action taken at a school election in School District No. 6 in the Town of Southampton.

Questions Presented.

1. Whether the legislature in granting to all qualified voters of the Village and Town of Southampton absentee voting pursuant to the 1947 constitutional amendment providing for absentee voting in elections other than general elections but failed to specifically extend the same privilege and convenience to all qualified voters in the Town of Southampton School District No. 6 election violated the Equal Protection Clause of the federal and state constitutions.

2. Whether the learned Special Term erred in holding that, in a proceeding in the nature of mandamus, a hearing was not required to be held where, among other things, the petitioners sought to establish the wide disparity between school districts in the Towns of Southampton and Riverhead in the disbursement of funds for each student and that fiscal dependence of school boards in Union Free School Districts on school real estate taxes

based on property assessments made by the Town Assessors does not enable them to carry out the constitutional mandate to provide equal educational opportunity for all children.

3. Whether the provisions of the constitution and the Election Law, which provide for absentee voting, are restricted in their application to absentee voting at a general election.

4. Whether a school district election, not being held at the time of a general election and not being a special election conducted under the Public Officers Law, does not qualify for the use of an absentee ballot.

Constitutional Provisions Involved.

United States Constitution, Fourteenth Amendment;
New York State Constitution; Article I, Section 2;
New York State Constitution, Article I, Section 11.

New York Statutes Involved.

Village Law, Section 4-445, L. 1967, c. 735;
Town Law, Section 84(4,5), L. 1968, c. 248 (1);
Election Law, Sections 117 and 117a:
Public Officers Law, Section 42;
Education Law, Section 2609(1).

Statement of Case.

On October 31, 1970, the Board of Education of Union Free School District No. 6, Town of Southampton, presented to the voters for their approval a comprehensive building program. The program involved constructing an addition to the existing high school building and utiliz-

ing the resulting structure as an intermediate school, and the construction of a new high school building on land already owned by the district. The voters were asked to approve this plan and the funding thereof through the sale of bonds at a total cost of $8,985,000. This plan was presented as a single proposition at a special district meeting held on October 31, 1970.

Notice of the meeting was published in the "Southampton Press" on October 1, 8, 15, 22, 29, 1970.

The final voter registration rolls listed 2,994 registered voters of whom 2,245 voted at said meeting. A total of 1,238 votes were cast in favor of the proposition, 948 votes were cast against, and 59 ballots were blank.

The Commissioner of Education rejected all of the contentions of the petitioners and found that on the present state of the pleadings no triable issues of fact existed, the resolution of which in favor of the petitioners would leave no rational basis for the decision of the Commissioner of Education, and ruled as follows:

1. That there is no provision for the use of absentee ballots in a school district election.

2. That the voters were not deprived of statutory and constitutional rights by virtue of the submission of a joint proposition which did not enable them to vote on each part of the proposition separately.

3. That the action of the Board of Education in using funds and facilities of the district in promoting the adoption of the building program was valid.

4. That the publication of the notice of a special district meeting in one newspaper instead of two was valid in the existing circumstances and that the omission to publish in two newspapers was not willful or fraudulent.

Reasons for Allowance of the Writ.

Petitioners urge the following reasons for the allowance of the writ:

1. The Equal Protection clause requires that the State provide the privileges and conveniences of absentee voting and registration to all qualified voters in the Southampton School District in a manner that does not violate the law of Equal Protection.

The constitution contains separate, differently worded provisions for absentee *voting* and absentee *registration*.

Article II, Section 2, gives the legislature broad authority to establish procedures for absentee voting.[1] The legislature is authorized to establish absentee voting procedures for qualified voters who fall within two categories:

1. Those who may be absent from the county of their residence (or, if residents of New York City, from the city).

[1]The section provides: "The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes."

2. Those who may be unable to appear personally at the polling place because of illness or physical disability.

Article II, Section 5,[2] *requires* that voters who fall within the following categories be permitted to register by absentee registration rather than in person:

1. Those who are unable to appear personally for registration:

—because of illness or physical disability (regardless of location).

—because of their duties, occupation or business require them to be outside the counties of the residence (or, in the case of residents of New York City, outside the city).

2. Those who are in military service or are inmates of veterans' hospitals (regardless of location).

3. A spouse, parent or child of a voter in any of the foregoing categories, accompanying or being with him

[2]That section, as amended in 1966, provides, in part, that "* * * voters who are in the actual military service of the state or of the United States, in the army, navy, air force or any branch thereof, or in the coast guard, or inmates of a veterans' bureau hospital and voters who are unable to appear personally for registration because of illness or physical disability or because of their duties, occupation or business require them to be outside the counties of their residence or, in the case of residents of the city of New York, their duties, occupation or business require them to be in a county outside such city; and a spouse, parent or child of such a voter in the actual military service or of such an inmate or of such a voter unable to appear personally for registration, accompanying or being with him or her, if a qualified voter and a resident of the same election district, and if outside of the county of such election district, shall not be required to register personally."

or her, if a qualified voter and a resident of the same election district, and if outside the county of such election district.

Although the constitutional language on absentee registration is drafted as an exception to the provisions on annual personal registration in Article II, Section 5, it has also been regarded as being applicable to the provisions on permanent personal registration in Article II, Section 6.

The legislature has adopted legislation establishing procedures for absentee voting in general elections and in village elections.[3] In special elections, absentee ballots are provided only for military personnel.[4]

The legislature has made provision for absentee registration for all state elections.

From 1846 until 1966, Article II, Section 1, of the Constitution included as a qualification for voting that a person vote "in the election district of which he * * * shall at the time be a resident and not elsewhere."[5]

[3]Election Law, §§ 117, 117-a, 302; Village Law, §4-444. Absentee ballots are authorized by Election Law, §302, for military voters who are absent from their election *district*, although effective January 1, 1967, the Constitution expressly authorized absentee voting only for persons (unless ill) who are absent from their home *county* (or from New York City).

[4]Election Law, §302.

[5]1846 Constitution, Article II, Sec. 1. This language was deleted in the amendment to Article II, Sec. 1, which was approved by the voters in the general election of 1966. From 1864 to 1966, Article II, Sec. 1, also contained a mandatory absentee voting provision applicable to military voters absent from the election district. See 1938 Report XI, pp. 166-7. The latter provisions were amended in 1938 and 1951.

The present absentee voting provisions originated in 1919. An amendment that year permitted, but did not require, the legislature to provide absentee voting for

> "* * * qualified voters who may, on the occurrence of any general election, be unavoidably absent from the state or county of their residence because their duties, occupation or business require them to be elsewhere within the United States."[5]

By successive amendments, this provision was expanded to its present inclusive form.[6]

Until 1951, the Constitution contained no provision on absentee registration. At that time, a provision on absentee registration for servicemen and patients in veterans' hospital, and their families was added.[7] This provision was amended in 1955 to cover voters unable to appear personally because of physical infirmity, or because their "duties, occupation or business" required them and their families to be outside the state. The provision was amended again in 1966, to permit a person to register *in absentia*, if absent from the county of his residence (or from New York City) for one of the specified reasons, as well as if absent from the state.

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[6]The most important changes were effected in 1947, 1955 and 1963.

[7]The 1951 provision, which amended Article II, Sec. 5, read as follows:

> "* * * but voters in the actual military service of the state, or of the United States, in the army, navy air force or any branch thereof, or in the coast guard, or an inmate of a veterans' bureau hospital located outside the state of New York, and a spouse, parent or child or such voter in the actual military service or of such inmate, accompanying or being with him or her, if a qualified voter and a resident of the same election district, shall not be required to register personally, and an application for an absentee ballot shall constitute personal registration whenever such registration is required."

Article II, Section 2, authorizes the legislature to establish absentee voting procedures for persons who, for any reason, are absent from the county of their residence (or from New York City), and for persons (regardless of their location) who are sick or disabled. This provision could be construed as preventing the legislature from authorizing absentee voting in cases outside these two categories—for example, in the case of voters who are absent from their election district but not from the county of their residence.[8]

Absentee voting is an administrative matter.

Specific provisions on absentee voting and absentee registration are contained in the Constitution. At the present time, there are the following differences between the two provisions:

1. The absentee voting provisions authorize, but do not require, absentee voting. By contrast, the provisions on absentee registration are mandatory.

[8]Until 1966, Article II, Sec. 1, prescribing the qualifications for voting, provided that a qualified voter could vote "* * * in the election district of which he or she shall at the time be a resident, and not elsewhere." This provision precluded the legislature from providing for absentee voting, except pursuant to specific constitutional authorization. This language, however, was removed in 1966 from the Constitution. Article II, Sec. 2, relating to absentee voting, was nevertheless retained. This, arguably, suggests that Article II, Sec. 2, is intended not merely to authorize the legislature to establish absentee voting in certain cases, but to bar the legislature from prescribing absentee voting in cases not within the scope of that provision. On the other hand, it might be contended that the 1966 amendment of Article I, Sec. 1, entitling qualified voters to vote "at every election for all officers elected by the people and upon all questions submitted to vote of the people," was intended to give the legislature unrestricted discretion over absentee voting; this interpretation, however, makes Article II, Sec. 2, superfluous.

2. The absentee voting provisions permit the legislature to authorize a person who is absent from the county of his residence (or from New York City) for *any* reason to vote by absentee ballot. The absentee registration provisions authorize absentee registration for a person who is absent from the county of his residence (or from New York City) only if his "duties, occupation or business" requires him to be elsewhere—thus, for example, precluding absentee registration by a person who is absent on vacation.[9]

3. The absentee voting provisions are relatively simple, whereas the absentee registration provisions are extremely complex and detailed.

School districts are as much an integral part of the state as villages or towns. The state has chosen to extend the benefits of absentee voting and registration to all qualified voters who reside in cities, towns and villages, and, more particularly, the Village and Town of Southampton. Failure to extend these benefits to all qualified voters in the Southampton school district is an act of discrimination. Our state's concern for the rights of voters is clearly revealed in the suffrage article of the Constitution.

Rinaldi v. Yaeger, 384 U. S. 305, 310-311 (1966); *McMillan v. Board of Education of the State of New York*, 430 F. 2d 1145, 1149 (2nd Cir. 1970).

In each of the cases, the state action under attack did not on its face or in its purpose discriminate against the taxpayers. In each of these cases, the basic "right" which

[9]The statute permits absentee voting by persons absent on vacation: Election Law, §117(6); Village Law, §4-444.

was effectively impaired was one of the state creation, which nonetheless had to be extended equally to all. And in each of the above cases, the Supreme Court looked beyond the superficial uniformity and nondiscriminatory intent of state action to find a denial of equal protection where there was a discriminatory result, and effective deprivation of a basic personal interest. Like the above line of Supreme Court cases, the instant case involves state action which in its result bears particularly harshly upon the taxpayers with respect to their vital personal interests.

The law of equal protection has evolved that even if a state is pursuing a policy that it is not constitutionally obligated to follow it must nonetheless refrain from any discriminatory practices in executing that policy (see, e. g., *Griffin v. Illinois*, 351 U. S. 12 [1955]; *Douglas v. California*, 372 U. S. 353 [1963]; *Shapiro v. Thompson*, 394 U. S. 618 [1969]). Any classification drawn in executing such a policy must be based on a reasonable basis, *Dandridge v. Williams* (397 U. S. 471 [1970]), or a compelling state interest (*Shapiro v. Thompson, supra*).

The "right/privilege" characterization has been specifically rejected as being dispositive by various decisions of the United States Supreme Court (see *Sherbert v. Werner*, 374 U. S. 398, 404, 1963 [unemployment insurance]; *Shapiro v. Thompson*, 394 U. S. 618, 627, 1969 [welfare]; *Fleming v. Nestor*, 363 U. S. 603, 611, 1960 [disability insurance]; *Slochower v. Board of Education*, 350 U. S. 551, 555, 1956 [public employment]; *Bolling v. Sharpe*, 347 U. S. 497, 1954 [public education]).

In *Griffin v. Illinois* (351 U. S. 12 [1965]), and its progeny, the Supreme Court has made clear that it will look to the effect of state action for purposes of judging

its constitutionality where the effect was to discriminate against the poor in respect of their basic equal right to effective criminal appellate review. The court invoked a rigorous equal protection test to invalidate an Illinois provision which charged a single scale of fees to all persons who ordered criminal trial transcripts.

The Illinois requirement, neither by its terms nor its purposes, discriminated against the poor. However, the court looked to the effect of the requirements and concluded that the practical unavailability of transcripts to the poor denied them equal protection of the law and an equal right to an effective criminal appeal.

Accordingly, the Illinois court was directed to provide full and effective appellate review to indigents either by providing free transcripts or otherwise. The court held that the refusal to pay for the transcript of an indigent denied equal protection of the laws because even though the state was not constitutionally compelled to provide an appeal it could not do so in a way that discriminated against a person and denied him the benefit of that policy because of his poverty.

The court said on page 18:

> "It is true a state is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all * * * But that is not to say that a state that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

In *Douglas v. California* (353 U. S. 535 [1963]), the Supreme Court applied this rigorous equal protection test to a California provision which, in the case of indigent appealing a criminal conviction, provided that the

appellate court would search the record to see whether it would be "of advantage to the defendant or helpful to the appellate court" to have counsel appointed for the appeal. The Supreme Court held that procedure unconstitutional; even though it uniformly gave to each individual the right to counsel on appeal if he could afford it and though the procedure served the otherwise legitimate state purpose of providing counsel only for non-frivolous appeals. Once again, the court looked to the impact of the procedure and held that once the right to appeal was granted the poor must have the same right to an appeal as the well-to-do.

Article II directs the legislature to provide a system of registration and, in establishing the procedures for voting, to preserve "secrecy in voting." It authorizes the legislature to provide for absentee voting and permanent personal registration. Bipartisan registration and election boards are mandated in any law "creating, regulating or affecting" such boards.

The State of New York, through its legislature, has accorded the qualified electors of the Southampton School District the right to vote upon the construction of a school, and upon the financing of a new school (Sec. 2021, subd. 7, of the Education Law; Sec. 37.00, Local Finance Law; Sec. 104.00, Local Finance Law).

Having exercised this plenary power and granted an election, not even the legislature can then provide for a system of voting that prevents or prejudices an elector from voting for a candidate or proposition of his choice without violating Article I, Section 1, of the New York State Constitution, and Article XIV, Section 1, of the Federal Constitution.

"No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof unless by the law of the land or the judgment of his peers" (New York State Constitution, Article I, Sec. 1).

"No state shall * * * deny to any person within its jurisdiction the equal protection of the laws" (Amendment XIV, Sec. 1, Constitution of the United States of America).

Peo. ex rel. Hotchkiss, 206 N. Y. 231, 99 N. E. 568, which states that the legislature exercising the plenary power to prescribe the method of conducting elections cannot so exercise the power as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents an elector from voting for a candidate of his choice violates the constitution.

In *Callaghan v. Voorhis,* 252 N. Y. 14, 168 N. E. 447, the court held that regulations on voting become unconstitutional in violation of New York State Constitution, Article I, Section 1, when they unnecessarily and unfairly prejudice one class of voters.

In *Crane v. Voorhis,* 257 N. Y. 298, 178 N. E. 169, the court held that all voters within reasonable regulations must have the same opportunity to vote under the provisions of New York State Constitution, Article I, Section 1.

In re Cavellier, 159 Misc. 212, 287 N. Y. S. 739; *Lynn v. Nichols,* 122 Misc. 170, 202 N. Y. S. 401, aff'd 210 App. Div. 812, 205 N. Y. S. 935.

The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth

Amendment of the United States Constitution and Article I, Section 2, of the New York State Constitution.

In *McDonald v. Board of Election Commissioners*, 265 F. Supp. (N. D. Ill. 1967), the court said at page 818:

> "It is, of course, the right of the State of Illinois to impose reasonable restrictions on the availability of the ballot. The absence of statutory provisions to accommodate persons unable to be present at the polls on election day perhaps would pose no constitutional problem. But once the right to vote by absentee ballot has been provided, there must be no arbitrary or discriminatory denial."

In *Yick Wo v. Hopkins*, 118 U. S. 356, 370 (1886), this court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." In *Reynolds v. Sims*, 377 U. S. 533, 561-62 (1964), this court said:

> "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

The right to vote is "close to the core of our constitutional system," *Carrington v. Rash*, 380 U. S. 89, 96 (1965), and "vital to the maintenance of democratic institutions." *Id.* at 94. It is "precious" and "fundamental." *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966). "(A)ny restrictions on that right strike at the heart of representative government." *Reynolds v. Sims, supra*, at 555. Neither homesite nor occupation "affords a permissible basis for distinguishing between qualified voters within the State." *Gray v. Sanders*, 372 U. S. 368, 380 (1963).

2. Due process of law required a hearing before the Commissioner of Education. Failure to conduct such a hearing is in violation of Section 6, Article I, of the New York State Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution.

One of the primary factors contributing to the great prestige attached to the office of the Commissioner of Education of New York State is its quasi-judicial power. In his quasi-judicial role, the Commissioner has been interpreted as an expert in education through whose decisions the educational program may be kept operating and not delayed by unnecessary court action.

The Education Law, Section 310, permits any person conceiving himself aggrieved by an action taken by any officer or school authority or meeting concerning any matter dealt with by the Education Law to appeal or petition to the Commissioner, who is authorized and required to decide the question raised if the complainant has sufficient legal interest in the matter. The types of complaints raised in the past include such matters as the formation or alteration of school districts and the designation of attendance zones within districts, the removal of teachers, admission and assignment of pupils and action on requests for use of school property. In deciding such appeals the Commissioner is not required to hold any quasi-judicial hearing.

Section 310 declares that the Commissioner's decision on appeals are "final and conclusive, and not subject to question or review in any place or court whatever." This provision has been construed to mean that the courts cannot weigh the Commissioner's decision unless it is shown that it was purely arbitrary, capricious or unreasonable. Unlike the decisions of many adminis-

trative agencies, it need not meet the test of being supported by "substantial evidence" (see, *Olson v. Board of Education,* 250 F. Supp. 1000 [E. D. N. Y. 1966]; *Lubell v. Nyquist,* 31 A. D. 2d 569, 294 N. Y. S. 2d 961).

There is no statutory provision or constitutional requirement that the Commissioner hold a hearing to determine whether the Board of Education exceeded the bounds of propriety by the improper and unlawful distribution of campaign letters to the voters and parents of school children or by improper and unlawful publication and distribution of an expensive and biased brochure or by the improper and unlawful use of district funds, property and facilities, teachers and pupils. However, in an appropriate case in a proceeding in the nature of mandamus, the court may direct a hearing to be held to determine whether there is a wide disparity between school districts in the Towns of Southampton and Riverhead in the disbursement of funds for each student and that fiscal dependence of school boards in Union Free School Districts on school real estate taxes based on property assessments made by the Town Assessors does not enable them to carry out the constitutional mandate to provide equal educational opportunity for all children.

Matter of Arcuri v. Macduff, 286 App. Div. 17;
Matter of Canada Dry Bottling Co. v. O'Connell, 284 App. Div. 370, aff'd 308 N. Y. 778;
Matter of Wignall v. Fletcher, 303 N. Y. 435, 440;
Matter of Newbrand v. City of Yonkers, 285 N. Y. 164, 174-176;
1 Benjamin on Administrative Adjudication in the State of New York, pages 354-356;
Jaffe on Administrative Law, pages 502, 503.

The real property tax is the biggest single source of local government revenues in New York State. Its use is regulated by numerous provisions of the Constitution,

such as those that limit the taxing and borrowing powers of localities and restrict the power of the legislature to prescribe exemptions. Administration of the tax is also regulated by constitutional provisions, such as those vesting the assessing function in cities, towns and villages and restricting its transfer.

The real property tax is by far the largest single revenue producer in the tax system of New York State and its local governments. It provides much more revenue, for example, than the combined yield of the personal income and retail sales taxes.

Revenues from the property tax, however, have not kept pace with the rising costs of local governments resulting from the expansion and existing services and the initiation of new ones required by social and economic advances. Meanwhile, large increases in state aid, new federal aid and local non-property taxes have been made available to fill the gap. These revenue sources have enabled localities to provide better services and have also in large part shifted the cost of many locally administered services to broader-based state and federal taxes with progressive characteristics.

Property taxes, as a result of these developments, are bearing a slowly declining share of total local expenditures. Nevertheless, they are still a large independent source of revenue for localities and they continue to furnish the practical basis for local participation in government affairs and home rule.

Costs of local government are expected to climb further in the foreseeable future, and property tax yields will have to move upward too if they are to continue in their traditional role. Whether the property tax can or

should be increased sufficiently to meet a large share of rising costs will be a basic question in considering constitutional proposals that would expand or limit the power of the legislature to make modifications in the tax.

In the six largest cities (Albany, Buffalo, New York City, Rochester, Syracuse and Yonkers), school taxes and debt are part of the overall city finances and must be fitted within the overall constitutional city tax and debt limitations.

School districts located wholly or partly in other cities have a constitutional limit on taxes for operating purposes ranging from 1.25 per cent to 2 per cent of the average full valuation and a debt limit of 5 per cent on the same base.

Districts outside the cities have no constitutional or statutory limits on property taxes, but do have a statutory debt limit of 10 per cent of current full value, with few exceptions.

Source: N. Y. State Comptroller, *Basic Data on Local Government and State-Local Relationships* (1967), page 51.

Conclusion.

Wherefore, petitioners respectfully request that this petition for a writ of certiorari be granted.

Dated: February 22, 1972.

Respectfully submitted,

BENNETT E. ARON,
ROY E. MONACO,
Attorneys for Petitioners.

BENNETT E. ARON,
Of Counsel.

APPENDIX.

Exhibit A.

Memorandum Decision on Motion for Leave to Intervene and Dismiss Upon Objections in Point of Law.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

[SAME TITLE.]

(Supreme Court, Albany County Special Term, June 11, 1971).
(Justice DeForest C. Pitt, Presiding)

Appearances:

Bennett E. Aron, Esq., Attorney for Petitioners.
Robert D. Stone, Esq., Attorney of Record for Respondent, Ewald B. Nyquist, Commissioner of Education of the State of New York.

Memorandum.

PITT, J.:

This Article 78 proceeding is brought to obtain judgment annulling the determination of the Respondent, Commissioner of Education, dismissing the petitioners' appeal before him. Petitioners seek to set aside an election held October 31, 1970, by the Union Free District No. 6 of the Town of Southampton, New York, which presented a comprehensive building program to the voters for their approval. The respondents have moved to dismiss the petition upon objections in point of law.

The said school district, not a party to this proceeding, has moved for an order allowing it to intervene.

The petitioners urge that the election should be set aside for the reason that no provision was made thereat for absentee ballots, with the alleged, possible result that certain voters were disenfranchised in violation of the New York State Constitution and provisions of the election law. Also urged is that the proposed building project should not have been presented as a single proposal. It is the petitioners' position that the Respondent, Commissioner, erred in his decision upon these issues and further erred in denying to the petitioners an opportunity to present oral testimony upon the hearing.

Section 311 of the Education Law grants to the Commissioner of Education the power to regulate the procedure to be employed in appeals brought before him. This the Commissioner has done. Part 376.2(d) of the Commissioner's Regulations states: "All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of all argument will be made." In *Matter of O'Brien v. Commissioner of Education,* 4 N. Y. 2d 140, the Court wrote at page 145: "Quite obviously, and we recently so held in a case very similar to the present one, the Commissioner of Education's resolution of a dispute on conflicting affidavits without an oral hearing neither directly involves the construction of the constitution nor poses a constitutional question of any kind." (See also: *Matter of Kuhn v. Commissioner of Education,* 1 A. D. 2d 533; *Matter of Savage v. Allen,* 13 Misc. 2d 489.)

Based upon the above and upon the nature of the issues presented at the hearing below the Court must conclude that the Commissioner did not err in the procedure employed by him.

With regard to the other objections raised by the petitioners the opinion of the Respondent, Commissioner, reflects a thorough consideration of the same and

a decision made in accordance with both reason and the authorities.

Consequently, the papers before this Court disclose no basis upon which the decision of the Commissioner may be disturbed, particularly in view of the limited area of judicial review available upon this proceeding. (*Matter of Vetere v. Allen*, 15 N. Y. 2d 259; *Matter of Board of Education of the City of New York v. Allen*, 6 N. Y. 2d 127; *Matter of Ocean—Hill v. Board of Education*, 23 N. Y. 2d 483.)

Accordingly, the respondent's motion to dismiss upon objections in point of law will be granted. The motion to allow intervention will also be granted so as to provide for the participation of the said school district in any further proceedings herein.

Submit order in accordance with the above.

Dated: Troy, New York.

Exhibit B.

Memorandum of Decision, Dated July 14, 1971.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

[SAME TITLE.]

(Supreme Court, Albany County Special Term, July 9, 1971.)

(Justice John H. Pennock, Presiding—referred to Hon. DeForest C. Pitt, for decision).

Appearances:

Bennett E. Aron, Esq., Attorney for Petitioners.
Robert D. Stone, Esq., Attorney for Respondent, Ewald B. Nyquist, Commissioner of Education of the State of New York.

Memorandum.

PITT, J.:

Upon a reading and examination of the supplemental briefs of all parties, and the papers submitted upon this motion for leave to reargue, it is this Court's considered opinion that the right to vote was not denied to any qualified voter in this school district. The failure to provide absentee ballots in a school election does not constitute a denial of equal protection of either federal or state laws. Section 117 of the Election Law does not apply to school elections and there is no provision for absentee ballots in the Education Law.

A comprehensive school building program can be presented to the voters of a school district as a single proposition. It is felt by this Court that the petitioners have not presented new issues of fact or law so as to allow for a reargument of this proceeding brought to set aside the determination of the Respondent, Commissioner of Education.

Motion for reargument submitted to the Special Term Supreme Court, Albany County on July 9, 1971, is denied without costs.

Submit order accordingly.

Dated: Troy, N. Y.
July 13, 1971.

Exhibit C.

Order.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Courthouse in the City of Albany, New York, commencing on the 15th day of November, 1971.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Walter B. Reynolds,
Hon. Louis M. Greenblott,
Hon. Michael E. Sweeney,
Hon. Richard D. Simons,
Associate Justices.

In the Matter

of

Elise H. Flanagan *et al.*,

Appellants,

v.

Ewald B. Nyquist, as Commissioner of Education of the State of New York,

Respondent,

and

Board of Education of Union Free School District No. 6 of the Town of Southampton,

Intervenor-Respondent.

County Clerk's Index No. 3352-1971

The petitioners, Elise H. Flanagan *et al.* having appealed from a judgment of the Supreme Court of Albany County, entered on the 7th day of July, 1971, in the office of the clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Bennett E. Aron, Esq., of counsel for appellants, and by Robert D. Stone, Esq. (Lawrence W. Reich, Esq., of counsel) for respondent Ewald B. Nyquist, as Commissioner of Education of the State of New York, and by Thomas J. Bourke, Esq., of counsel for intervenor-respondent Board of Education of Union Free School District No. 6 of the Town of Southampton, and after due deliberation, the Court having rendered a decision on the 20th day of December, 1971, it is hereby

ORDERED that the aforesaid judgment of the Supreme Court of the County of Albany be, and the same hereby is affirmed, and the petition be, and the same hereby is dismissed without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: December 24, 1971.

Exhibit D.

Judgment.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

of

ELISE H. FLANAGAN *et al.*,

Appellants,

v.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Respondent,

and

BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 6 OF THE TOWN OF SOUTHAMPTON,

Intervenor-Respondent.

Index No. 3352-1971

The above named petitioners having moved in the Appellate Division, Third Judicial Department for permission to appeal to the Court of Appeals from an order of said Appellate Division affirming in all respects a judgment of the Supreme Court, Albany County, entered in the Office of the Clerk of Albany County on July 7, 1971, which said judgment denied in all respects the relief demanded in the petition herein and dismissed said petitioners' application to review and to annul, vacate

and set aside a decision of the Commissioner of Education, said order of affirmance by the Appellate Division, together with a judgment thereon having been entered in the Office of the Clerk of Albany County on December 27, 1971;

And said motion for permission to appeal to the Court of Appeals having been denied by said Appellate Division;

Now, on motion of Robert D. Stone, Counsel for respondent herein, it is hereby

ADJUDGED, that the motion of petitioners for permission to appeal to the Court of Appeals is denied, without costs.

Dated: Albany, New York
February 17, 1972

s/ JOHN S. BARTLETT, JR.
Albany County Clerk

Exhibit E.

Order.

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Courthouse in the City of Albany, New York, on the 17th day of January, 1972.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Louis M. Greenblott,
Hon. Michael E. Sweeney,
Hon. Richard D. Simons,
Hon. Walter B. Reynolds,
Associate Justices.

In the Matter

of

Elise H. Flanagan *et al.*,

Appellants,

v.

Ewald B. Nyquist, as Commissioner of Education of the State of New York,

Respondent,

and

Board of Education of Union Free School District No. 6 of the Town of Southampton,

Intervenor-Respondent.

A motion having been made by appellants at this term of Court in the above-entitled proceeding for an order granting appellants permission to appeal to the Court of Appeals; now, after reading and filing proof of due service of the notice of motion, the affirmation of Bennett E. Aron, Esq., of counsel for appellants, dated the 3rd day of January, 1972, in support of the motion, and the affidavits of Thomas J. Bourke, Esq., of counsel for intervenor-respondent, dated the 12th day of January, 1972, and of James H. Whitney, Esq., of counsel for respondent, dated the 12th day of January, 1972, in opposition thereto, and the Court having rendered a decision on the 9th day of February, 1972, it is hereby

ORDERED that the motion of appellants for permission to appeal to the Court of Appeals is denied, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: February 16, 1972.

A True Copy:

JOHN J. O'BRIEN
Clerk

Exhibit F.

Order of the Court of Appeals of the State of New York.

COURT OF APPEALS.

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of February A. D. 1972.

Present,

Hon. Stanley H. Fuld, Chief Judge, presiding.

3

Mo. No. 104

IN THE MATTER

of

The Application of ELISE M. FLANAGAN and NINNA MURRAY.

Appellants.

For a Judgment &c.

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York.

Respondent.

and

BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK.

Intervenor-Respondent.

A motion having heretofore been made herein upon the part of the intervenor-respondent to dismiss the appeal taken by the appellants in the above cause to this Court, said motion having been joined in upon the part of the respondent, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

DOCKET NO. 71 - 1181

In The Matter of the Application
of
ELSIE H. FLANAGAN and NINNA MURRAY,

Petitioners,

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Board of Education of Union
Free School District No. 6,
Town of Southampton
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Southampton, New York 11968
Tel: 516 - 283 - 0046

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

DOCKET NO. 71 - 1181

In The Matter

of

The Application of ELISE H. FLANAGAN and NINNA MURRAY,

Petitioners,

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, respectfully prays that the petition herein for Writ of

Certiorari to the Appellate Division, Third Department, of the State of New York, be denied.

OPINIONS BELOW

The decision of the Commissioner of Education of the State of New York was rendered on March 23, 1971, and officially reported and designated as decision No. 8256; 10 Education Department Reports ___ (A-22)*

The decision of the New York Supreme Court, Albany County, was handed down on June 23, 1971. and officially reported in 66 Misc. 2d 736 (Petitioners Appendex 22). Said Supreme Court's decision on petitioners motion for reargument was handed down on July 13, 1971, and is not officially reported (Petitioners Appendex 25).

The Appellate Division, Third Department, New York, unanimously affirmed the decision of the New York Supreme Court by opinion dated December 20, 1971, (A-30) which is officially reported in 38 A.D. 2d 645.

Petitioners motion in the said Appellate Division, Third Department for permission to appeal to the Court of Appeals of the State of New York was denied without opinion.

---

*Numbers in parentheses refer to the Appendex hereto unless otherwise noted.

Respondents motion to dismiss the appeal taken by petitioners to the Court of Appeals was granted by said Court on the ground that no substantial constitutional question is involved.

PROCEEDINGS BELOW

The decision of the Commissioner of Education of the State of New York was rendered on March 23, 1971.

The decision of the Supreme Court of the State of New York, Albany County, dismissing the petition herein was rendered on June 23, 1971; judgment was entered thereton on July 7, 1971, and a copy thereof with notice of entry was served upon all parties on July 7, 1971.

The decision of the Appellate Division of the Supreme Court of the State of New York, Third Department, unanimously affirming the aforesaid Supreme Court judgment of July 7, 1971, was rendered on December 20, 1971; an order was entered thereon on December 24, 1971, and judgment entered thereon on December 27, 1971; copies of said order and judgment with notice of entry thereof were served upon all parties hereto on December 27, 1971.

By Notice of Appeal dated December 30, 1971, petitioners attempted to take an appeal to the Court of Appeals of the State of New York as a matter of right, relying solely on an alleged constitutional ground, to wit, that the failure

to provide absentee ballots in school district elections violates the equal protection clause of the Fourteenth Amendment to the United State Constitution and the Constitution of the State of New York. Respondent's motion to dismiss said appeal was granted as aforesaid by order of the Court of Appeals dated February 10, 1972, and a judgment was entered thereon on March 2, 1972. A copy of said order with notice of entry was served on all parties hereto on February 29, 1972. A copy of said judgment and order together with notice of entry thereof was served on all parties hereto on March 6, 1972.

Petitioners motion in the Supreme Court of the State of New York, Appellate Division, Third Department for permission to appeal to the Court of Appeals was denied by said Appellate Division by order dated and entered February 16, 1972. Judgment was entered thereon on February 17, 1972. Copies of said order and judgment with notice of entry thereof were served upon all parties hereto on February 18, 1972.

Petitioners have not made any motion in the Court of Appeals of the State of New York, nor in any way sought leave of said Court for permission to appeal to the said Court of Appeals.

QUESTIONS PRESENTED

Respondent submits that there is no constitutional question properly before this Court.

STATEMENT OF THE CASE

The above entitled proceeding was brought by petitioners to set aside the determination of the Commissioner of Education of the State of New York dated March 23, 1971, wherein said Commissioner of Education dismissed an appeal taken by petitioners and one Charlotte Harris seeking to set aside the action taken at a special school district meeting of Union Free School District No. 6, Town of Southampton, Suffolk County, New York, held on October 31, 1970. The purpose of said meeting was to secure voter approval of a proposition authorizing the construction of an addition to the District's High School building, the conversion of the resulting structure into an Intermediate School, the construction of a new High School, and to authorize the issuance of bonds to finance the two projects at a total estimated cost of not to exceed $8,985,000.00.

Four prior school building and/or land acquisition propositions had been turned down by the voters. The Board of Education thereupon developed the comprehensive building program which was submitted to the voters as a single proposition as above set forth.

The notice of special meeting was published in the Southampton Press on October 1, 8, 15, 22, and 29, 1970. In addition the School District conducted an extensive program designed to inform the voters of the nature of the proposition, the date, time and place of registration and the date, time and place of voting.

The final registration rolls for the meeting listed 2994 registerd voters; 2245 of whom voted at the meeting, representing the largest voter turnout ever in the District. The result of the voting was as follows: Total number of ballots cast, 2245; Total number of blank ballots, 59; Total number of ballots cast in favor of the proposition, 1238; Total number of ballots cast against the proposition, 948.

No voter requested an absentee ballot. No facts were alleged nor any proof offered by petitioners in the proceedings below that any qualified voter was denied the right to vote and the record supports the finding by the Commissioner of Education that it did not appear that there were any qualified voters not present in the district on the day of the election. No voter was challenged as unqualified to vote either at or before the election.

The Commissioner of Education ruled that there was no right to an absentee ballot in a school district election, that a comprehensive plan could be voted upon as a single proposition, that the

publication of the notice of meeting was valid, that the activities of the Board of Education in supporting the proposition were valid, and that since no alleged unqualified voter was challenged, there was no reason to set aside the election.

In the Article 78 Proceeding commenced by petitioners in Supreme Court, Albany County, New York, to review the determination of the Commissioner of Education, the Court at Special Term held that the procedures employed by the Commissioner of Education were proper and that an opportunity to present oral testimony was not required; in view of the limited area of judicial review available, there was no basis upon which the Commissioner's decision may be disturbed; that the right to vote was not denied any qualified voter; the failure to provide absentee ballots in a school district election does not constitute a denial of equal protection of either federal or state law; and that a comprehensive school building program may be presented to the voters as a single proposition.

The Appellate Division unanimously affirmed the lower Court judgment, noting that the Commissioner of Education specifically found that there was no constitutional infirmity as to the election in question by virtue of the fact that absentee ballots are not provided for in school district elections. The Court specifically determined that petitioners' attempt to raise such a constitutional question in this

proceeding is without merit since the record supports the Commissioner's findings that it did not even appear that there were any qualified voters not present in the district on the day of the election.

The Appellate Division further determined that the alleged constitutional issue concerning the use of real property tax for the funding of school districts, was not raised by petitioners in the prior proceeding and therefore was not properly before the Court and did not decide same.

POINT I

PETITIONERS HAVE NOT EXHAUSTED THEIR REMEDIES FOR REVIEW IN THE COURTS OF NEW YORK

As heretofore pointed out in the statement of Proceedings Below, although petitioners sought permission from the Appellate Division, Third Department for leave to appeal to the Court of Appeals, no application has been made by petitioners to the Court of Appeals itself for such permission.

Section 5602(a) of the Civil Practice Law & Rules of New York makes provision for taking an appeal to the Court of Appeals by permission of the Appellate Division before application to the Court of Appeals, or by permission of the Court of Appeals upon refusal by the Appellate Division or upon direct application to the Court of Appeals. Where permission to appeal to the Court of Appeals has been denied by the Appellate Division, petitioners' motion in the Court of Appeals for permission to appeal must be made within thirty days from the date of services of a copy of the Appellate Division's order denying permission to appeal with notice of entry. Section 5513(c), N.Y. Civil Practice Law & Rules.

Inasmuch as petitioners have not exhausted all their remedies for review by the Court of Appeals of the State of

New York, their present petition for a writ of certiorari is not properly before this Court and should be dismissed.

McMaster v. Gould, 276 US 284, 72 L Ed 574, 48 S Ct 299

Stratton v. Stratton, 239 US 55, 36 S Ct 26, 60 L Ed 142

Matthews v. Huwe, 269 US 262, 46 S Ct 108, 70 L Ed 266

Southern Electric Co. v. Stoddard (Beha) 269 US 186, 46 S Ct 71, 70 L Ed 227

Leach v. Peo. of the State of California, 283 US 808, 75 L Ed 1427

Banks v. California, 395 US 708, 89, S Ct 1901, 23 L Ed 2d 653

Although petitioners attempted a direct appeal to the New York Court of Appeals as a claimed matter of right solely on alleged constitutional grounds, pursuant to section 5601(b) of the Civil Practice Law & Rules, concerning a claimed right to absentee ballots in school district elections, said appeal was dismissed on respondent's motion, and no attempt has been made by petitioners to seek permission from said Court of Appeals for leave to appeal to said Court for any reason whatsoever, even for the second reason advanced by petitioners in their present petition, to wit, petitioners contention that a hearing should

be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education.

POINT II

PETITIONERS ALLEGED CONSTITUTIONAL QUESTION CLAIMING A RIGHT TO A HEARING TO ESTABLISH DISPARITY BETWEEN SCHOOL DISTRICTS IN THE DISBURSEMENT OF FUNDS AND THE USE OF REAL PROPERTY TAX FOR THE FUNDING OF EDUCATION IS NOT PROPERLY BEFORE THIS COURT, NOT HAVING BEEN RAISED IN THE PLEADINGS AND PROCEEDINGS BELOW.

As noted in the decision of the Appellate Division, Third Department, petitioners' contention that a hearing should be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education, was not even raised in the proceedings below and the issue was not properly before the Court. The record herein discloses that the only issue before the Commissioner of Education and the New York Supreme Court was whether or not the special district meeting of October 31, 1970, was conducted as provided by law. It should be noted that petitioners' argument for an evidentiary hearing on the aforesaid disparity question was urged by them for the first time in their brief in the Appellate Division, and was no doubt prompted by a recent California State Supreme Court decision concerning the use of real property taxes for education.

It is submitted that where the

claimed federal question has not been properly raised, preserved or passed upon in the state courts below, the United States Supreme Court will not entertain a petition for a writ of certiorari based upon same.

Warfield v. Chaffe, 91 US 690, 23 L Ed 383

Louisville & Nashville R. Co. v. Woodford, 234 US 46, 34 S Ct 739, 58 L Ed 1202

Cardinale v. Louisiana, 394 US 437, 89 S Ct 1162, 22 L Ed 398

DeBacker v. Brainard, 90 S Ct 163, 396 US 28, 24 L Ed 2d 148

Lynch v. New York, 293 US 52, 55 S Ct 16, 79 L Ed 191

POINT III

NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS DIRECTLY INVOLVED HEREIN

The other constitutional grounds upon which petitioners seek an appeal to this Court is that the failure to provide absentee ballots in a school district election violates the equal protection clause of the Fourteenth Amendment and the New York State Constitution.

As noted in the decision of the Commissioner of Education (A-22) and the unanimous decision of the Appellate Division (A-30), the attempt to raise such a constitutional issue in this proceeding is without merit since the record herein supports the finding that it does not appear that there were any qualified voters not present in the district on the day of the election. Since there is nothing in the record to indicate that any qualified voter, including petitioners, was denied the right to vote, by absentee ballot or otherwise, it is respectfully submitted that petitioners have no standing and are seeking the review of an abstract question, the determination of which cannot in any way alter or effect the outcome of the subject school district election.

In effect the Appellate Division found that the petitioners raising such a constitutional issue in the proceeding below was merely an attempt, unsupported by the record, and the Court found it

unnecessary to even pass upon the alleged constitutional question. It is submitted that a mere attempt to raise a constitutional question is not sufficient, that the claimed constitutional question must in fact be a real, direct and substantial one and that the Supreme Court will not pass upon abstract propositions or declare principles or rules of law which cannot effect the matter in issue in the case before it.

Local No. 8-6, Oil, Chemical & Atomic Workers Int. Union, AFL-CIO v. Missouri, 361 US 363, 4 L Ed 2d 373, 80 S Ct 391

Kimball v. Kimball, 174 US 158, 19 S Ct 639, 43 L Ed 932

It is further submitted that no substantial constitutional question is directly involved herein, for the reason that the claimed constitutional question involves not the right to vote itself, but merely a method of exercising it. This issue, involving the claimed right to an absentee ballot, has already been authoritatively decided by the Supreme Court of the United States in McDonald v. Board of Elections Commissioners of Chicago, 394 US 802, 22 L Ed 2d 739, 89 S Ct 1404, wherein the Court analyzed the Standards of Equal Protection and found that there had been no violation of equal protection by an Illinois statute which made absentee ballots available to some persons but not certain others.

A petition for a writ of certiorari based upon alleged constitutional grounds should be dismissed where the question has already been authoritatively settled.

Rule 19 1(a), Rules of the Supreme Court of the United States

Minneapolis, St. P. & S.S.M. Ry. Co. v. C. L. Merrick Co., 254 US 376, 41 S Ct 142, 65 L Ed 312

Utley v. St. Petersburg, 292 US 106, 54 S Ct 593, 78 L Ed 1155

POINT IV

PETITIONERS HAVE FAILED TO ESTABLISH JURISDICTION FOR A REVIEW ON WRIT OF CERTIORARI

Rule 19 1(a) of the Rules of this Court sets forth the basic character of the reason to be considered by this Court in granting or denying review on writ of certiorari. It is respectfully submitted that the petition herein in no way sets forth or establishes that a state court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in any way probably not in accord with applicable decisions of this Court.

As heretofore pointed out, the Appellate Division found petitioners' claimed constitutional questions to be absolutely lacking in merit and unsupported by the record below, and further found it unnecessary to pass upon same.

Nowhere does the petition herein even allege that the State Court decided the matter in any way not in accord with the applicable decisions of this Court. Respondent submits that McDonald v. Board of Elections, etc., supra, is the controlling decision of this Court on the question of the right to absentee ballots and petitioners have not seen fit to even cite the McDonald decision of this Court or attempt to distinguish same from the present case. In fact, the only reference to McDonald in petitioners' brief is a quotation from the District Court decision in said case.

The petiton herein further fails to comply with Rule 23 of the rules of this Court in that

1. the petition does not set forth or refer to the opinion of the Appellate Division, Third Department (A-30) or the opinion of the Commissioner of Education (A-22) as required by Rule 23 1(a) and (i), and states that the Appellate Division, Third Department affirmed without opinion, whereas said Court did in fact render a written opinion.

2. Petitioners' statement of the case fails to specify the stage in the proceeding at which and the manner in which the claimed federal questions were raised, the method of raising them and the way they were passed upon, as required by Rule 23 1 (f).

   In fact, it is respectfully submitted that the claimed federal question concerning the alleged right to a hearing to determine disparity between school districts and the use of real property taxes for funding school districts was not even alleged in the pleadings or arguments before the Commissioner of Education or the New York Supreme Court at Special Term. This argument appeared for the first time in petitioners' brief upon the argument of the appeal

before the Appellate Division and as that Court stated, the issue was not properly before the Court and therefore not decided by the Court.

Respondent respectfully submits that the petition for a writ of certiorari should be denied for the reason that petitioners have not demonstrated why review should be granted in terms of public importance. Petitioners claim that there has been a deprival of a constitutional right. But who has been so deprived? Certainly as the State Court opinions indicate, there is nothing in the record to support petitioners claim of injury. They appear to be arguing an abstract question on behalf of hypothetical persons other than themselves.

It is submitted that petitioners' sole purpose in attempting to seek a writ of certiorari herein is to further harass and delay respondent Board of Education in proceeding with the construction project and bond issue approved by the voters of the district on October 31, 1970. Since the inception of this proceeding by way of the appeal to the Commissioner of Education, petitioners whole course of conduct has been one of constant delay, at one time necessitating a motion in the Appellate Division by respondent to dismiss the appeal for petitioners' failure to prosecute same within the time prescribed by the rules of that Court.

Since obtaining voter approval as aforesaid, respondent Board of Education has completed plans and specifications and received competitive bids on the construction project approved by the voters, but is unable to award contracts, sell bonds or issue bond anticipation notes because of the pending litigation.

Respondent submits that this proceeding and any attempt at a further view herein is frivolous and wholly without merit, and that petitioners sole purpose is to harass and delay the construction project. Petitioner Murray has openly declared that it is her intention to hold up construction for as long as two years. The delay caused by the pending litigation and petitioners attempts to seek a further review will cause irreparable damage to the School District in the form of increased construction costs and higher interest rates on bonds.

It is further submitted that the present petition is so groundless as to present an appropriate case for the awarding of reasonable damages to Respondent Board of Education for the delay occasioned by this proceeding, pursuant to subdivision 4 of Rule 56 of the Rules of this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS J. BOURKE
Attorney for Respondent Board of Education of Union Free School District No. 6, Town of Southampton

APPENDIX.

EXHIBIT A.

Decision of the Commissioner of Education of the State of New York

No. 8256

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

Before the Commissioner

IN THE MATTER
of the

Appeal of ELISE H. FLANAGAN, CHARLOTTE HARRIS and MINNA MURRAY from the action of the Board of Education of Union Free School District No. 6 of the Town of Southampton, Suffolk County in relation to the conduct of a special district meeting.

Bennett E. Aron, Esq....Attorney for Petitioners

Thomas J. Bourke, Esq...Attorney for Respondent

Petitioners seek an order setting aside the action taken by a special district

meeting on October 31, 1970. The purpose of this meeting was to secure voter approval of a proposition to authorize the construction of an addition to respondent's high school building, the conversion of the resulting structure into an intermediate school, the construction of a new high school, and to authorize the issuance of bonds to finance these two projects. The voters of the district approved the proposition by a vote of 1,238 to 984.

Petitioners urge the invalidation of the meeting on the ground that the failure to provide absentee ballots violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. The relevant portion of the amendment states:

> "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The New York State Constitution makes provision for absentee ballots in Article 2, section 2.

> "The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters

> who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes."

It should be noted that the language of the section is permissive rather than mandatory. The Legislature has provided for the use of absentee ballots in general elections by section 117 of the Election Law. In the absence of a specific provision for absentee ballots in the Education Law, the question arises as to whether they must be used in school elections. On various occasions the courts of this State have distinguished school district elections from general elections. The Appellate Division of the Supreme Court has held that school district elections are not elections within the meaning of Article 2 of the Constitution (Berge v. Hollister, 275 App. Div. 852). The Court of Appeals in In re Gage (141 N.Y. 112) reached the same conclusion.

The question of absentee ballots in school district elections has been specifically considered by the courts.

> "Moreover section 117 of the Election Law refers to the board of central registration, fixes a time limit for absentee ballot applications inconsistent with

the time schedule normally followed in school district elections, and speaks in terms of personal registration, which in many school districts is not required. It is, thus, made clear that the Legislature when it provided in subdivision 1 of section 2609 of the Education Law that school district elections 'shall be conducted, so far as may be, in accordance with the provisions of the election law' did not intend to make the absentee ballot provisions of the election law applicable to school districts." Savage v. Board of Education City of Glen Cove School District (29 Misc. 2d 725, at 726; 8 AD 2d 911; 7 NY 2d 706.)

In support of their contentions petitioners argue that implicit in the decision of the United States Supreme Court in Kramer v. Union Free School District No. 15 (395 U.S. 621) is a finding that school district meetings are elections within the meaning of the State Constitution. The Supreme Court in Kramer scrutinized section 2012 of the Education Law, and concluded that the requirement of that statute that an otherwise qualified voter must also own or lease real property in the district or be the parent or have custody of children enrolled in the local public schools was violative of the equal protection

clause of the Fourteenth Amendment. The court was careful to point out that the case involved an absolute denial of the franchise. This situation was expressly distinguished from that of a claimed right to an absentee ballot.

The right to an absentee ballot was considered in McDonald v. Board of Education Commissioners of Chicago (394 U.S. 802). That case involved unsentenced inmates of Cook County jail who were unable to appear at the polls and were not included in various classes of persons entitled to absentee ballots by Illinois statute. The decision of the court rests on the distinction between a statute which denies the franchise and a statute which merely makes voting more available to some groups who cannot easily get to the polls. Where denial of the franchise is involved, the court as in Kramer (supra), will apply a more stringent evaluation of the statutory classifications and the underlying state interests. However, in the absentee ballot situation the more traditional standards are to be applied to a claim of denial of equal protection of the laws.

In the present appeal no valid claim of disfranchisement has been advanced. Petitioners have argued that some people, particularly those who maintain summer homes in the district, were not present in the district on the day of the special meeting and thus could not vote. It has not been established that these individuals were qualified voters of the district.

A person can have only one residence or domicile which is the place of permanent residence or home. Op. Atty Gen. (51 St. Dept. 123 (1934), Matter of Beck (74 St. Dept. 78 (1953). There is nothing in Kramer (supra) or McDonald (supra) which supports petitioners' claim of a denial of the equal protection of the laws.

Petitioners also contend that the form of the ballot used in the special district meeting was defective. The construction program and the financing thereof were presented as a single proposition, whereas petitioners argue that four separate questions relating to these matters should have been placed on the ballot pursuant to section 2022, subdivision 2 of the Education Law. This section, which is applicable to a vote taken during the annual meeting of the district, provides that a majority of the qualified voters present at the meeting may determine to vote separately the necessary funds for specific items in the budget. It is not applicable to a special district meeting called for the approval of building projects. In a case decided prior to the addition of subdivision 2 to section 2022, the Supreme Court of Nassau County held that a school board could include a comprehensive program for school development in a single proposition Corbett v. Union Free School District No. 21, Town of Hempstead (199 Misc. 930).

It is further alleged that notice of the special meeting was defective in that

it was published in only one newspaper instead of two newspapers as required by section 2004 of the Education Law. Respondent argues that there is only one newspaper of general circulation within the district. Section 2010 states that the proceedings of a district meeting shall not be invalidated for lack of due notice unless the omission to give such notice was wilful and fraudulent. Petitioners have failed to establish fraud or wilfulness. Furthermore, the extensive voter participation refutes the contention that voters were not notified of the meeting. As has been indicated in the past, the results of such a meeting will not be invalidated if there has been a good voter turnout (Matter of Knodt, 6 Ed. Dept. Rep. 49 (1966)).

The activities of the board of education in support of the proposition have also come under attack by the petitioners. These allegations, likewise, are untenable. Boards of education are obligated to disseminate information concerning school budgets or proposed programs so that the voters can make an informed choice (Matter of Smith, 7 Ed. Dept. Rep. 107 (1968)).

Finally, the petitioners have alleged that various unqualified persons were allowed to vote. Respondent contends that no voter was challenged. The failure to challenge allegedly unqualified voters is dispositive of the matter. If, furthermore, unqualified voters were allowed to vote without challenge, the

meeting would, in any event, not be set aside unless there exists a reasonable probability that the results of the election would be changed by the elimination of the illegal votes (Boyes v. Allen, 32 App. Div. 2d 990). No proof that unqualified voters participated in the district meeting having been presented, I will not set aside the actions taken at the meeting.

THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 23rd day of March, 1971.

SEAL

/s/ Ewald B. Nyquist

Commissioner of Education

EXHIBIT B.

Decision of Supreme Court-Appellate Division, Third Department

SUPREME COURT-APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

December 20, 1971. 17738

In the Matter of Elsie H. Flanagan et al.,
Appellants,

v.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York,
Respondent,

and

BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON,
Intervenor-Respondent.

Appeal by the petitioners from a judgment of the Supreme Court at Special Term, entered in Albany County on July 7, 1971, which dismissed the petition herein upon the merits.

The petitioners contested by way of an appeal to the respondent commissioner the validity of a school district election at which the voters of the district approved a certain building program and the issuance of bonds to fund the project. The Commissioner refused to set aside the results of the elction. The Commissioner specifically found that there was no constitutional infirmity as to the election in question by virtue of the

fact that absentee ballots are not provided for in school district elections. Among other things, he noted that it did not appear that there were any qualified voters not present in the district on the day of the election, and that finding is supported by the record. Accordingly, the petitioners' attempt to raise such a constitutional issue in this Article 78 proceeding is without merit.

The petitioners further content upon this appeal that a hearing should be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education. This question was not properly raised in the prior proceedings and would appear to go to the issue of the constitutionality of a real property tax for the funding of school districts. The issue is not properly before us and we do not decide the same.

There is no showing that the Commissioner has erred as a matter of law or that his determination was otherwise purely arbitrary. (Cf. Matter of Board of Educ., Cent. School Dist. No. 2, Town of Oyster Bay v. Nyquist, 36 A D 2d 199, 201.)

Judgment affirmed, without costs.

HERLIFHY, P.J., REYNOLDS, GREENBLOTT, SWEENEY and SIMONS, JJ., concur.

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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1971
Docket No.71-1181.

In the Matter of the Application
of
ELSIE H. FLANAGAN and NINNA MURRAY,
Petitioners,

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

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IN THE

Supreme Court of the United States

October Term, 1971

Docket No. 71-1181.

In the Matter of the Application
of
ELSIE H. FLANAGAN and NINNA MURRAY,
Petitioners,

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

Respondent Ewald B. Nyquist, as Commissioner of Education of the State of New York, respectfully prays that the petition herein for writ of certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department be denied.

Opinions and Orders Below

The orders of the State of New York Supreme Court, Albany County, are annexed hereto as appendixes A and B.

The orders of the State of New York Supreme Court, Appellate Division, Third Judicial Department, and the order of the State of New York Court of Appeals are annexed to the petition for writ of certiorari as appendixes C, E and F respectively. The opinion of the State of New York Supreme Court, Appellate Division, Third Judicial Department is annexed hereto as appendix C, and is reported at 38 AD 2d 645. The opinion of the State of New York, Supreme Court, Albany County is reported at 66 Misc. 2d 736. The opinion of the latter on the motion for reargument is dated July 9, 1971, and is not officially reported.

Jurisdiction

The asserted basis of jurisdiction is alleged denial of petitioners' right to equal protection of the law under the Fourteenth Amendment to the United States Constitution and to due process of law under the Fourteenth Amendment to the United States Constitution. Statutory provision alleged conferring on this Court to review the order in question is 28 U. S. C. sec. 1257 (3).

Questions Presented for Review

1. Was not the New York Court of Appeals correct when it held, in effect, that the United States Constitution does not require the New York Legislature to provide absentee balloting procedures for school districts simply because such procedures are provided for federal, state and certain municipal elections, particularly where the nature of the school district meeting is such that it is practically impossible to provide for absentee balloting?

2. Was not the New York Court of Appeals correct when it held, in effect, that the hearing before the Com-

missioner of Education fully satisfied the requirement of due process of law?

Constitutional Provisions and Statutes Involved

Amendment XIV, United States Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 28 U. S. Code, Section 1257 (3):

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Statement of the Case

On October 31, 1970, the Board of Education of Union Free School District No. 6, Town of Southampton, presented to the voters for their approval a comprehensive building program. The program involved constructing an addition to the existing high school building and utilizing the resulting structure as an intermediate school, and the construction of a new high school building on land already owned by the district. The voters were asked to

approve this plan and the funding thereof through the sale of bonds at a total cost of $8,985,000. This plan was presented as a single proposition at a special district meeting held on October 31, 1970.

Notice of the meeting was published in the "Southampton Press" on October 1, 8, 15, 22, 29, 1970. In addition, the superintendent of schools and various board members spoke to local civic groups, and prepared brochures and news releases. The local radio station was also furnished material relating to the building program and the special district meeting.

The final voter registration rolls listed 2994 registered voters, of whom 2245 voted at said meeting. A total of 1238 votes were cast in favor of the proposition, 948 votes were cast against, and 59 ballots were blank.

No voter requested an absentee ballot, nor was any voter challenged.

The Commissioner of Education ruled that there was no right to an absentee ballot as alleged in the petition, and that no irregularity had been demonstrated which would constitute valid grounds for setting aside the results of the election.

ARGUMENT

I. Petitioners have not exhausted all of their remedies for review by the Courts of the State of New York.

A writ of certiorari to the Appellate Division, Third Department, of the State of New York should not be granted to petitioners, who have failed to apply to the New York Court of Appeals for leave to appeal as provided by subdivision (a) of section 5602 of the Civil Practice Law and Rules of the State of New York.

The order of the Court of Appeals granting a motion to dismiss petitioners' appeal upon the ground that no substantial constitutional question was directly involved related solely to petitioners' appeal as of right to that court as provided by subdivision (b) of section 5601 of the Civil Practice Law and Rules of New York. As the result of petitioners' failure to apply to the New York Court of Appeals for permission to appeal, the judgment appealed from is not that of the highest court of the State. If the highest court of the State has been authorized by statute to review the decision of inferior courts in its discretion, and no application has been made therefor, this Court should decline to review the action of the inferior court *Mathews* v. *Huwe*, 269 U. S. 262; *Stratton* v. *Stratton*, 239 U. S. 55; *Andrews* v. *Virginian R. Co.*, 248 U. S. 272.

II. Petitioners lack standing to raise a constitutional question.

At no time have petitioners established that they, or any qualified voter of the school district, applied for or were refused an absentee ballot. The president of the board of education stated in an affidavit that neither of the petitioners nor any other voter in the district at any time applied to the board of education, the board registration or the district clerk for an absentee ballot. Respondent noted in his decision that no valid claim of disenfranchisement had been established (66). Petitioners' argument that some persons who maintain summer homes within the school district could not vote in the special district meeting at issue was totally unsupported by any evidence that these individuals were qualified voters or that they had applied for an absentee ballot.

The Appellate Division of the Supreme Court, Third Department ruled that respondent's finding that there were

no qualified voters not present in the school district on the day of the special district meeting was supported by the record. That Court concluded that:

> "Accordingly, petitioners' attempt to raise such a constitutional issue in this Article 78 [of the Civil Practice Law and Rules] proceeding is without merit." (Appendix C hereto)

From the record, it is readily apparent that petitioners have not sought absentee ballots, and are thus not injured by the alleged failure of the State of New York to provide such ballots. In essence, petitioners seek an advisory opinion from this Court in the absence of a justiciable controversy. The judicial power does not extend to the determination of abstract questions *Muskrat* v. *United States,* 219 U. S. 346. A claim based upon an assumed potential invasion of rights is not enough to warrant judicial intervention *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *United States* v. *West Virginia,* 295 U. S. 463. As this Court indicated in *Local No. 8-6, Oil, Chemical and Atomic Workers International Union AFL-CIO et al.* v. *Missouri,* 361 U. S. 363, constitutional questions are not to be dealt with abstractly; they will not be anticipated but will be dealt with only as they are appropriately based upon a record before the court. Clearly, the record in this case lacks any basis for the consideration of the constitutional issue petitioners attempt to raise.

Petitioners may not assert the right of equal protection of law on behalf of other residents of the district. Parties to the litigation should rely only upon constitutional rights which are personal to themselves *Tileston* v. *Ullman,* 318 U. S. 44; *National Assoc. for Advancement of Colored People* v. *Alabama, ex rel. Patterson,* 357 U. S. 449; *Pratt* v. *LaGuardia,* 182 Misc. 462, affd. 268 App. Div. 973, appeal dismissed 294 N. Y. 842.

Therefore, petitioners lack standing to raise a constitutional question on the alleged denial of equal protection in school district elections in New York.

III. The equal protection clause does not require that absentee ballots be made available to voters in school district elections.

Article II, section 2 of the New York Constitution authorizes, but does not require, the State Legislature to provide a manner in which voters in any election who are absent from their residence or unable to appear personally at the polling place may vote. The Courts of New York have uniformly held that various provisions of Article II of the New York Constitution refer to general elections and are not applicable to school district meetings and elections *Spitzer* v. *Village of Fulton*, 172 N. Y. 285; *Berge* v. *Hollister*, 275 App. Div. 852; *Turco* v. *Union Free School District No. 4, Town of North Hempstead*, 43 Misc. 2d 367, affirmed 22 AD 2d 1018.

An examination of the various sections of Article II clearly reveals that this Article was not intended to apply to school districts. Section 1 which specifies the qualifications of voters refers to residency in a city, county or village, rather than school district. This point is significant because very few school districts are coterminous with any of these political subdivisions. Similarly, section 5, concerning registration of voters makes no reference to school districts. Section 8 provides for bipartisan registration and election boards, with representation equally divided among political parties. School district elections in New York State have traditionally been non-political in nature.

The Legislature has provided for the use of absentee ballots for general elections by section 117 of the Election

Law. This statute repeatedly refers to general elections, makes an express exception in the case of ballots for "an election of school district officers at which no other public officer is to be elected," and has been construed as not applying to school district elections *Savage* v. *Board of Education, City of Glen Cove School District,* 29 Misc. 2d 725, affd. 8 AD 2d 650, motion for permission to appeal denied, 8 AD 2d 911, motion for leave to appeal denied, 7 NY 2d 706. The Attorney General of New York has also ruled that sections 117 and 117-a of the Election Law are by their terms restricted to a general election, or a special election held pursuant to section 42 of the Public Officers Law (1966 Op. A. G. 80, 1968 *id.* 111).

The failure to provide absentee ballots in a school election does not disenfranchise a voter. In argument before the respondent Commissioner of Education, petitioners attempted to rely upon the decision of this Court in *Kramer* v. *Union Free School District No. 15,* 395 U. S. 621, in support of their contention that school district meetings since *Kramer* are elections within the meaning of the Election Law. In *Kramer,* a denial of franchise case, this Court concluded that the classification of eligible voters was not sufficiently precise to limit the vote to those primarily interested in school affairs as argued by the State of New York. In instances where the franchise is denied or impaired the Court indicated that the test to be applied is whether the exclusions are necessary to promote a compelling state interest *Carrington* v. *Rash,* 380 U. S. 89; *Pope* v. *Williams,* 193 U. S. 621; *Cipriano* v. *City of Houma,* 395 US 701; *Phoenix* v. *Kolodziejski,* 394 US 204; *Dunn* v. *Blumstein,* ____ US ____, No. 70-13, March 21, 1972, 40 LW 4269.

Contrary to petitioners' contention, *Kramer* did not make the New York Election Law applicable to New York school district meetings and elections. It merely invalidated paragraphs a, b and c of subdivision 3 of section 2012 of the New York Education Law. On remand, the three-judge court in fact specifically stated that section 2012 remained the applicable law except as indicated (a copy of the order and judgment is attached hereto and made a part hereof).

There is an important distinction between the right to vote and the right to an absentee ballot, as noted by Chief Justice WARREN in *Kramer* at 395 US 624:

> "This case presents an issue different from the one we faced in *McDonald* v. *Board of Election Comm'rs of Chicago,* 394 US 802, 98 St. Ct. 1404 (1969). The present appeal involves an absolute denial of the franchise. In *McDonald,* on the other hand, we were reviewing a statute which made casting a ballot easier for some who were unable to come to the polls. As we noted, there was no evidence that the statute absolutely prohibited anyone from exercising the franchise; at issue was not a claimed right to vote but a claimed right to an absentee ballot."

In *McDonald,* this Court indicated that the proper test of the constitutional validity of a statute according the privilege of absentee ballots to some voters and denying this privilege to others, which statute has been challenged upon the theory of a denial of equal protection of the laws, is whether the statute bears some rational relationship to a legitimate state end. There, as distinguished from absolute denial of the franchise cases, the statutory classification will be set aside only if no grounds can be conceived to justify them *McGowan* v. *Maryland,* 366 US 420; *Kotch* v. *Board of River Port Pilot Commissioners,* 330 US

552; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 US 61; *Walters* v. *City of St. Louis*, 347 US 231.

The omission of the Legislature in not providing absentee ballots for school meetings and elections is required by practical necessity and reflects the traditional concept of the town-meeting type of district election, *i.e.*, a meeting of the inhabitants of the district. Section 2011 of the Education Law provides that:

> "Whenever any district meeting shall be duly called, it shall be the duty of the inhabitants qualified to vote thereat, to assemble at the time and place fixed for the meeting."

With certain exceptions, the basic concept of this type of school district meeting provides for the making of motions from the floor, which are seconded and passed and may cover appropriations of money for stated purposes, reductions in appropriations or elimination of appropriations; such motions may cover a wide variety of matters relating to the governance of the school district. There is no requirement (except for issuance of obligations, nomination of candidates for the school board and a few other items) conditioning such motions upon inclusion in the notice for the meeting. Hence there is no way that an absentee ballot could be prepared and sent out prior to the meeting and yet contain those matters on which a vote will need to be had. To send out such necessarily incomplete absentee ballots would serve no purpose and would, in fact, partially disfranchise the persons receiving them.

With certain exceptions, the budget vote can be had by items, again based on motions made from the floor and not required to be noticed prior to the meeting.

This option of the voters who attend in person would likewise be removed if absentee ballots were permitted.

Individual voters may initiate propositions which may be filed not less than six days before a district meeting in districts where voting machines are used (Section 2035, subdivision 2 of the Education Law). Similarly, nominations of candidates for a board of education may be made at least 14 days prior to the school district elections (Section 2018 of the Education Law). Obviously, these submission deadlines would preclude timely mailing of absentee ballots and their return. It is clear, therefore, that under the entire legislative scheme of the New York State school system, absentee ballots are not practically feasible.

There is a further problem in trying to make absentee ballot procedures applicable to New York school districts. These units of government do not have permanent election boards, such as the municipalities referred to by petitioners possess. The "election inspector" provided by the Education Law, function only during the meeting or election and there is no staff available, nor any provisions of statute providing for the necessary procedures, such as exist for cities, towns, counties and villages. Where personal registration is provided by local decision, again the functions of the registration board are specifically circumscribed and do not provide for absentee ballot procedures such as exist for the municipalities under the Election Law (See Election Law, §§ 117, 117-a, 117-b, 118, 119, 121, 122, 123, 153-a, 85 (subd. 2), 330 (subd. 4 & 7), 204, 274, 221, 222, 262, 229, 314).

Petitioners' contention that because qualified voters in general elections have the benefit of absentee registration and voting, the State of New York may not fail to provide this benefit to voters in school meetings is simplistic and without merit. A similar argument was raised in *McDonald, supra*, and was rejected. See also, *Ozan Lumber Co.*

v. *Union County National Bank*, 207 US 251; *Miller* v. *Wilson*, 236 US 373; *Semler* v. *Dental Examiners*, 294 US 608; *South Carolina* v. *Katzenbach*, 383 US 301. In New York, it has also been held that legislation which does not affect all areas uniformly is not rendered unconstitutional as a denial of equal protection of the law *Packer Collegiate Institute* v. *University of New York*, 273 App. Div. 203; *Four Maple Drive Realty Corp.* v. *Adams*, 2 AD 2d 753, appeal denied 2 AD 2d 781, appeal dismissed 2 NY 2d 837, appeal dismissed 355 US 14.

It is well established that equal protection of the law has been achieved when all of the same class are treated in a like manner, even though that one class is treated differently than other classes *Yick Wo.* v. *Hopkins*, 118 US 356, 367, *Queenside Hills Realty Co.* v. *Wilson*, 294 NY 917, affirmed 328 US 80, *Engelsher* v. *Jacobs*, 5 NY 2d 370. In the instant case, all voters within the class of citizens voting in school district meetings and elections are treated similarly, even though different rules necessarily apply to those voting in a general election.

It should also be noted that there is no constitutional right to vote in a school district election *Janowsky* v. *Parsons*, 207 Misc. 107, affirmed 285 App. Div. 601; *Cohen* v. *State*, 52 Misc. 2d 324; *Three Village Taxpayers Association* v. *Board of Education of Three Village Central School District No. 1* (Supreme Court, Suffolk County, TASKER, J. n. o. r. NYLJ, Sept. 19, 1968, page 18, columns 6, 7); *Oliver* v. *Board of Education of New York City*, 306 F. Supp. 1286.

Furthermore, a majority of the citizens of New York reside in city school districts with a population in excess of 125,000. These large city school districts are fiscally

dependent upon the cities they serve, and most of them have appointed boards of education. The affairs of these school districts are governed by Article 52 of the Education Law, which makes no provisions for voting of any kind by the residents of these school districts.

Therefore, there is no right to an absentee ballot in a school district meeting or election, and the failure to provide an absentee ballot did not constitute a denial of equal protection of the laws. The courts below properly refused to invalidate the decision of Respondent Nyquist.

IV. The hearing before the Commissioner fully satisfied the requirement of due process of law.

The Commissioner's resolution of this dispute without the admission of oral evidence does not raise a constitutional question. Part 276.2 (d) of the Regulations of the Commissioner states: "All evidentiary material shall be presented by affidavit of by exhibits. No testimony is taken and no transcript of oral argument will be made." The statutory authority for this regulation is contained in section 311 of the Education Law, which gives the Commissioner the power to regulate the practice in appeals brought pursuant to section 310 of the Education Law.

On two different occasions, the New York Court of Appeals has upheld the procedure of the Commissioner in cases contesting school elections whose subjects were bond issues and increased taxation, directly affecting the property rights of the residents of the districts. See also *Matter of Savage* v. *Allen*, 13 Misc. 2d 489; *Matter of Liebman* v. *Van Denburg*, 168 Misc. 155.

In *Matter of O'Brien* v. *Commissioner of Education*, 4 NY 2d 140, cert. denied *sub nom. Murphy* v. *Commissioner*

of Education, 361 US 117, the New York Court of Appeals stated at page 145:

> "Quite obviously, and we recently so held in a case very similar to the present one, that Commissioner of Education's resolution of a dispute on conflicting affidavits without an oral hearing neither directly involves the construction of the constitution nor poses a constitutional question of any kind. (See *Matter of Kuhn* v. *Commissioner of Educ.*, 2 N. Y. 2d 749, . . .) . . ."

In *Matter of Kuhn* (*supra*), the Court of Appeals denied leave to appeal from the decision of the Appellate Division found at 1 AD 2d 533. That decision said in part, at 537:

> "Neither do we deem arbitrary his [Commissioner of Education's] election to rest his decision upon the great mass of proof adduced in affidavit form and by other documents rather than to receive oral testimony as he was authorized to do by section 311 or subdivision 12 of 2215 of the Education Law, such reception being permissive and discretionary under the rules of practice adopted pursuant to section 311."

Petitioners concede that there is no statutory or constitutional requirement that the Commissioner hold a hearing to determine whether the board of education exceeded the bounds of propriety with its informational program in support of the building program. The other issues raised before the Commissioner, *e.g.*, the use of absentee ballots, the proper form of a ballot and the requirements of due notice of the meeting are all questions of law for which an evidentiary hearing is inappropriate. Petitioners have suggested that this Court might direct a hearing to be held to determine whether there is a wide disparity between districts regarding the disbursement of funds for each student. This matter was never raised before the Commissioner, and under New York Procedure it is com-

pletely outside the scope of judicial review of his decision (Section 7803, Civil Practice Law and Rules). The Appellate Division, Third Department expressly refused to consider this question not raised before the Commissioner of Education, as follows (Appendix C hereto):

> "The petitioners further contend upon this appeal that a hearing should be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education. This question was not properly raised in the prior proceedings and would appear to go to the issue of the constitutionality of a real property tax for the funding of school districts. The issue is not properly before us and we do not decide the same."

It should also be noted that this issue is totally irrelevant to the validity of the special district meeting which petitioners have challenged. Therefore petitioners may not rely upon this issue to question the procedure employed by the Commissioner of Education.

Conclusion

The petitioners have not exhausted all of their remedies for review by the Courts of the State of New York. The petitioners lack standing to raise a constitutional question. The Fourteenth Amendment to the United States Constitution does not prohibit the State of New York from providing the convenience of absentee balloting to voters in general elections held within the state and withholding this convenience from voters in school district elections and meetings held in the State of New York. The hearing before the Commissioner of Education fully satisfied the requirement of due process of law. In the absence of a substantial federal question, this Court should decline to re-

view the decisions of the Commissioner and the Courts of the State of New York.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

APPENDIX A

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse in the City of Albany, on the 11th day of June, 1971.

Present: Hon. DeForest C. Pitt,

Justice.

(Same Title.)

Petitioners, Elise H. Flanagan and Ninna Murray, by their attorney, Bennett E. Aron, Esq., having commenced a special proceeding for judgment pursuant to section 7806, of the Civil Practice Law and Rules annulling and setting aside a judicial determination duly made pursuant to section 310 of the Education Law by Ewald B. Nyquist, as Commissioner of Education of the State of New York, which dismissed the appeal of said Elise H. Flanagan, Ninna Murray and one other from the action of the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, in relation to the conduct of a special district meeting, and said appeal having regularly come on to be heard before the Hon. DeForest C. Pitt at a Special Term, Part I of this Court, held at the County Courthouse thereof, located in the City of Albany, on the 11th day of June, 1971, and the petitioners having duly appeared by Bennett E. Aron, Esq., and the respondent Ewald B. Nyquist, having duly appeared by Robert D. Stone, Counsel to the Commissioner of Education of the State of New York (James H. Whitney, Esq., of Counsel) and the intervenor Board of Education of Union Free School District No. 6 of the Town of Southampton, New York having duly appeared by Thomas J. Bourke, Esq.,

and the issues in the above-entitled proceeding having been submitted in lieu of oral argument at the call of the calendar.

Now, upon reading and filing the notice of motion dated the 1st day of May, 1971 and the petition duly verified the 1st day of May, 1971, together with the exhibits annexed thereto, all in support of petitioners' application to review the decision of the Commissioner of Education and for judgment in accordance with petitioners' prayer for relief, and upon the notice of motion to dismiss the petition dated the 25th day of May, 1971 and the affidavit of James H. Whitney, Esq., sworn to the 25th day of May, 1971, all in support of said motion to dismiss the petition and in opposition to petitioners' motion to review, and upon the stipulation permitting joinder of the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, and upon the briefs and affidavits submitted by the attorneys for the respective parties, and upon all the proceedings heretofore had herein; due deliberation having been given; and a decision of this Court having been made thereon on June 23, 1971, by the Hon. DeForest C. Pitt in favor of the respondent Ewald B. Nyquist, as Commissioner of Education of the State of New York and respondent-intervenor the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, directing the entry of judgment as hereinafter provided, it is

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of respondent Ewald B. Nyquist as Commissioner of Education of the State of New York and the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York and against Elise H. Flanagan and Ninna Murray, dismissing on the merits the

petition to review heretofore served herein, and the same is hereby dismissed without costs.

Dated: July 2, 1971.

Enter

DEFOREST C. PITT
Justice of the Supreme Court

APPENDIX B

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Albany on the 9th day of July, 1971 (Justice John H. Pennock, Presiding—referred to Hon. DeForest C. Pitt, for decision).

Present: Hon. DeForest C. Pitt.

(Same Title.)

Petitioners, Elise H. Flanagan and Ninna Murray, by their attorney, Bennett E. Aron, Esq., having commenced a special proceeding for judgment pursuant to section 7806 of the Civil Practice Law and Rules annulling and setting aside a judicial determination duly made pursuant to section 310 of the Education Law by Ewald B. Nyquist, as Commissioner of Education of the State of New York, said appeal having regularly come on to be heard before the Hon. DeForest C. Pitt at a Special Term, Part I of this Court, held at the County Courthouse thereof, located in the City of Albany, on the 11th day of June, 1971, and a decision of this Court having been made thereon on the 23rd day of June, 1971 by the Hon. DeForest C. Pitt in favor of the respondent Ewald B. Nyquist, as Commissioner of Edu-

cation of the State of New York and respondent-intervenor the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, directing the entry of judgment, said judgment having been signed by the Hon. DeForest C. Pitt on the 2nd day of July, and duly entered on the 7th day of July, 1971, and an application to reargue having been made by the petitioners;

Now, upon reading and filing the notice of motion dated the 28th day of June, 1971, and the affirmation dated the 28th day of June, 1971, all in support of petitioner's application to reargue petitioners' original application to review the decision of the Commissioner, and upon the affidavit of James H. Whitney, Esq., sworn to the 8th day of July, 1971, submitted by the respondent Ewald B. Nyquist, as Commissioner of Education, and upon the affidavit of Thomas J. Bourke, Esq., sworn to the 8th day of July, 1971, which was submitted by the respondent-intervenor Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, all in opposition to said application to reargue, no oral argument having been requested or heard, and upon all the pleadings and proceedings heretofore had herein, due deliberation having been had thereon, it is

ORDERED, ADJUDGED AND DECREED that petitioners' application for reargument be and the same is hereby denied and the judgment heretofore rendered in this matter is affirmed, without costs.

Dated: Troy, New York, July 29, 1971.

Enter

DEFOREST C. PITT
Justice of the Supreme Court

APPENDIX C

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

December 20, 1971. 17738

(Same Title.)

Appeal by the petitioners from a judgment of the Supreme Court at Special Term, entered in Albany County on July 7, 1971, which dismissed the petition herein upon the merits.

The petitioners contested by way of an appeal to the respondent commissioner the validity of a school district election at which the voters of the district approved a certain building program and the issuance of bonds to fund the project. The Commissioner refused to set aside the results of the election. The Commissioner specifically found that there was no constitutional infirmity as to the election in question by virtue of the fact that absentee ballots are not provided for in school district elections. Among other things, he noted that it did not appear that there were any qualified voters not present in the district on the day of the election, and that finding is supported by the record. Accordingly, the petitioners' attempt to raise such a constitutional issue in this Article 78 proceeding is without merit.

The petitioners further contend upon this appeal that a hearing should be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education. This question was not properly raised in the prior proceedings and would appear to go to the issue of the constitutionality of a real property tax for the funding

of school districts. The issue is not properly before us and we do not decide the same.

There is no showing that the Commissioner has erred as a matter of law or that his determination was otherwise purely arbitrary. (*Cf. Matter of Board of Educ., Cent. School Dist. No. 2, Town of Oyster Bay* v. *Nyquist*, 36 A D 2d 199, 201.)

Judgment affirmed, without costs.

HERLIHY, P. J., REYNOLDS, GREENBLOTT, SWEENEY and SIMONS, JJ., concur.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MORRIS H. KRAMER,

Plaintiff,

against

UNION FREE SCHOOL DISTRICT #15, RAYMOND S. BARON, JESSE CESTARI, BARDON DIEXEL, RALPH J. EDSEL, J. GIBSON FRUIN, ELLIOT A. NORWALK and HAROLD S. ROSENFELD,

Defendants,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor.

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66 Civ 76
Judgment

This cause having been decided by the Supreme Court of the United States of America in favor of plaintiff, June 16, 1969, and having been, by that Court remanded for further proceedings consistent with the said opinion of the United States Supreme Court so rendered on June 16, 1969, and a further hearing having been held thereon on November 24, 1969, before this Court, it is hereby

ORDERED, ADJUDGED AND DECREED that paragraphs a, b and c of subdivision 3 of the New York State Education Law section 2012, together with the language of the opening paragraph of subdivision 3 of said section following

the semi-colon therein are in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and are hereby declared to be void and of no further force and effect; and it is, further,

ORDERED, ADJUDGED AND DECREED that the remaining voting qualifications of said section 2012 of the New York State Education Law shall be and remain in full force and effect and shall constitute the only valid voting qualifications for any and all school district meetings and elections to which said section is applicable, held or to be held on and after June 17, 1969; and it is further,

ORDERED, ADJUDGED AND DECREED, that said remaining voting qualifications of said section 2012 shall be and remain in full force and effect and shall constitute the only valid voting qualifications for any and all school district meetings and elections in Union Free School District No. 15 of the Town of Hempstead, Nassau County, New York, held or to be held on and after June 17, 1969; and it is, further,

ORDERED, ADJUDGED AND DECREED that nothing herein shall be deemed to affect the validity of elections heretofore held under said section 2012.

Dated: Brooklyn, New York, December 10th, 1969.

LEONARD P. MOORE
United States Circuit Judge

JOHN R. BARTELS
United States District Judge

JACK B. WEINSTEIN
United States District Judge